A **PARTI ISLAM SE-MALAYSIA & ORS v. TAN SRI DATO' SERI ABDUL AZIZ MOHD YUSOF & ORS**

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ROHANA YUSUF JCA
B PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: W-01(NCVC)(W)-72-02-2014]
10 JUNE 2015

C ***ELECTION:*** *Conduct of election – Breach of constitutional duty to properly conduct elections – Allegation of conspiracy and fraud – Application for declaration that elections were null and void – Jurisdiction – Whether High Court had jurisdiction to question election by way of writ action – Whether High Court excluded from exercising jurisdiction over election matters – Federal Constitution, art. 118 – Whether jurisdiction vested solely with Election Court – Election Offences*
D *Act 1954, ss. 32, 33(1)*

ELECTION: *Conduct of election – Breach of constitutional duty to properly conduct elections – Allegation of conspiracy and fraud – Jurisdiction to remove members of Elections Commission – Whether High Court has jurisdiction to remove members of Elections Commission – Whether jurisdiction vested with*
E *Yang Di Pertuan Agong acting on recommendation of Tribunal – Federal Constitution, art. 114(3) – Election Offences Act 1954, ss. 32, 33(1)*

CIVIL PROCEDURE: *Striking out – Appeal against – Appeal against High Court's decision in striking out plaintiffs' action against defendants for breach of constitutional duty to properly conduct elections – Jurisdiction – Whether High*
F *Court had jurisdiction to hear plaintiffs' suit – Whether action ought to be struck out for being vexatious, frivolous and abuse of court process – Rules of Court 2012, O. 18 r. 19(1)(b) or (d)*

CIVIL PROCEDURE: *Jurisdiction – High Court – Election offences – Whether*
G *High Court had jurisdiction to question election by way of writ action – Whether High Court excluded from exercising jurisdiction over election matters – Whether jurisdiction vested solely with Election Court – Removal of members of Elections Commission – Whether jurisdiction vested with Yang Di Pertuan Agong acting on recommendation of Tribunal – Federal Constitution, arts. 114(3), 118 – Election*
H *Offences Act 1954, ss. 32, 33*

The plaintiffs brought an action against the Elections Commission (the defendants herein who were sued as members of the Elections Commission) alleging conspiracy and fraud in relation to the use of indelible ink in the 13th General Elections (GE13). The opposition, Pakatan Rakyat, comprising of
I the Parti Islam Se-Malaysia ('PAS'), the Democratic Action Party ('DAP') and the Parti Keadilan Rakyat ('PKR') lost 43 seats in the GE13 with allegedly relatively narrow margins. The plaintiffs alleged that the failure of the indelible ink which was intended to prevent multiple voting by dishonest

voters was caused solely by the defendants' breach of their constitutional duty to properly conduct the GE13. The plaintiffs further alleged that the defendants had practiced fraud on the electorate by the misuse of the indelible ink. The plaintiffs contended that the failure of the indelible ink rendered the election results null and void. The defendants contended that the plaintiffs' action was 'frivolous and vexatious' or 'an abuse of the process of court' and hence ought to be struck out pursuant to O. 18 r. 19(1)(b) or (d) of the Rules of Court 2012. The High Court Judge found that the court did not have the jurisdiction to grant the reliefs sought by the plaintiffs and held that the plaintiffs were bound by art. 118 of the Federal Constitution and the Election Offences Act 1954 in that any challenge to the elections in respect of any of the 222 seats of Parliament must be by way of an election petition to an election judge. Thus, the learned judge found the plaintiffs' claim to be obviously unsustainable and accordingly ordered it to be struck out. Hence, the plaintiffs appealed. The issues raised herein were (i) whether the High Court had jurisdiction to question an election by way of a writ action where (a) a breach of constitutional duty and fundamental liberties was alleged against the Elections Commission; and (b) fraud, deceit, conspiracy and misfeasance by a public officer was alleged; (ii) whether the principle in *R Rama Chandran v. The Industrial Court of Malaysia* to mould the relief in accordance with the demands of justice applicable in this case and (iii) whether the High Court had jurisdiction to make an order removing the members of the Elections Commission from their office.

Held (dismissing appeal)
Per Alizatul Khair Osman JCA (for the majority):

(1) From the language of art. 118 of the Constitution, an election in Malaysia can only be questioned by an election judge trying an election petition. The effect of the aforesaid provisions is that the High Court is excluded from exercising any jurisdiction over all matters that call into question an election be it to the House of Representation or to the State Assembly. Based on s. 32 read together with s. 33(1) of the Election Offences Act 1954, an election petition is to be tried by an Election Judge which under the said Act is defined as a judge of the High Court nominated by the Chief Judge to try an election petition.

(1a) The plaintiffs, *vide* their civil suit, was in effect calling into question or rather challenging the results of the GE13. The plaintiffs' claim, therefore, fell squarely within the scope of art. 118 and as such could only be brought by way of an election petition to be heard by an election judge and not by way of a civil suit to be adjudicated upon by a judge in the exercise of his or her ordinary civil jurisdiction. The mere pleading of the causes of action could not purport to confer jurisdiction on the High Court as the effect of these causes of action and the reliefs sought was to call into question the elections which by

virtue of art. 118 was vested solely with the Election Court. Any attempt to confer jurisdiction on the High Court by pleading such causes of action would amount to a violation of art. 118.

(2) The High Court Judge had not erred in holding that the principle in *R Rama Chandran* did not apply in the present case. The Federal Court when enunciating the principle was dealing with a case where the High Court was exercising its supervisory jurisdiction under s. 25 read together with para.1 of the Schedule to the Courts of Judicature Act 1964. The Federal Court held that the High Court in *certiorari* proceedings not only had the power to quash the impugned decision but could mould the relief in accordance with the exigencies of the situation in order to satisfy the demands of justice. In the instant case, there was no question of the court exercising its power to mould the relief as the court did not in the first place have the jurisdiction to hear the matter.

(3) Article 114(3) of the Federal Constitution clearly states that the High Court does not have the jurisdiction to remove members of the Elections Commission from their office. Article 114(3) provides that members of the Elections Commission can only be removed from office on the like grounds and manner as that of a judge of a Federal Court. Thus, as with a judge of the Federal Court, the jurisdiction to remove members of the Elections Commission is vested with the Yang Di Pertuan Agong acting on the recommendation of the tribunal set up for that purpose. The High Court, therefore, did not have any jurisdiction to make an order for the removal of the defendants from their office. Thus, the plaintiffs' suit ought to be struck out for being vexatious, frivolous and an abuse of the process of the court.

Per Prasad Sandosham Abraham JCA (dissenting):

(1) The appellants were seeking purely declaratory relief in terms of the exercise of the constitutional powers and duties of the respondents under the Federal Constitution read together with the Elections Act 1958 and Regulations. Prayer (1) could stand on its own, seeking a declaratory order without any consequential relief. It was open for the appellants to raise by way of a declaration whether the respondent had breached their constitutional duty to conduct the General Elections with fairness. This was an important issue that should not be summarily disposed of. Seeking a declaration of rights without consequential relief should be encouraged since the law under s. 41 of the Specific Relief Act 1950 allowed the same.

(2) This was not a fit and proper case for a summary disposal by way of O. 18 r. 19 of the Rules of Court 2012. For the aforesaid reasons, the order of the High Court should be varied to allow the appellant's claim in terms of prayer (1) only of the statement of claim of the appellants

to be reinstated; the matter to be remitted back to the High Court for case management and the parties to be at liberty to amend their respective pleadings.

Bahasa Malaysia *Translation Of Headnotes*

Plaintif-plaintif membawa tindakan guaman terhadap Suruhanjaya Pilihan Raya (defendan-defendan yang disaman sebagai ahli-ahli Suruhanjaya Pilihan Raya) dengan dakwaan terdapat konspirasi dan penipuan berhubungan penggunaan dakwat kekal semasa Pilihan Raya Umum yang ke-13 ('GE13'). Pihak pembangkang, yang terdiri daripada Parti Islam Se-Malaysia ('PAS'), Democratic Action Party ('DAP') dan Parti Keadilan Rakyat ('PKR') kehilangan 43 kerusi dalam GE13 dengan margin yang rendah. Plaintif-plaintif mendakwa bahawa kegagalan dakwat kekal yang bertujuan menghalang undi berganda oleh pengundi-pengundi yang tidak jujur adalah akibat pelanggaran kewajipan perlembagaan defendan-defendan untuk menjalankan GE13 dengan betul. Plaintif-plaintif juga mendakwa bahawa defendan-defendan telah menipu pengundi dengan menyalahgunakan dakwat kekal. Plaintif-plaintif menghujahkan bahawa kegagalan dakwat kekal menyebabkan keputusan pilihan raya terbatal dan tidak sah. Defendan-defendan menghujahkan bahawa tindakan plantif-plaintif 'frivolous and vexatious' atau 'satu penyalahgunaan proses mahkamah' dan dengan itu harus dibatalkan menurut A. 18 k. 19(1)(b) atau (d) Kaedah-Kaedah Mahkamah 2012. Hakim Mahkamah Tinggi mendapati bahawa mahkamah tidak mempunyai bidang kuasa untuk membenarkan relif-relif yang dituntut plaintif-plaintif dan memutuskan bahawa plaintif-plaintif terikat dengan per.118 Perlembagaan Persekutuan dan Akta Kesalahan Pilihanraya 1954 di mana apa-apa bantahan terhadap pilihan raya berkenaan 222 kerusi Parlimen harus dilakukan melalui petisyen pilihan raya kepada hakim pilihan raya. Oleh itu, hakim bicara mendapati bahawa tuntutan plaintif-plaintif dengan jelasnya tidak boleh bertahan dan seterusnya membatalkannya. Oleh itu, plaintif-plaintif membuat rayuan. Isu-isu yang timbul adalah (i) sama ada Mahkamah Tinggi mempunyai bidang kuasa mempersoalkan pilihan raya melalui tindakan writ di mana (a) terdapat dakwaan pelanggaran kewajipan perlembagaan dan kebebasan asasi terhadap Suruhanjaya Pilihan Raya; dan (b) dakwaan berlakunya penipuan, frod, konspirasi dan misfeasans oleh seorang pegawai awam; (ii) sama ada prinsip *R Rama Chandran v. The Industrial Court of Malaysia* untuk membentuk relif menurut tuntutan-tuntutan keadilan diguna pakai dalam kes ini; dan (iii) sama ada Mahkamah Tinggi mempunyai bidang kuasa untuk memerintahkan penyingkiran ahli-ahli Suruhanjaya Pilihan Raya daripada tugas mereka.

Diputuskan (menolak rayuan)
Oleh Alizatul Khair Osman HMP (keputusan majoriti):

(1) Berdasarkan bahasa per. 118 Perlembagaan, pilihan raya di Malaysia hanya boleh dipersoalkan oleh hakim pilihan raya yang membicarakan petisyen pilihan raya. Kesan peruntukan itu adalah bahawa Mahkamah Tinggi terkecuali daripada melaksanakan budi bicara ke atas segala perkara yang mempersoalkan pilihan raya sama ada kepada Dewan Rakyat atau kepada Dewan Undangan Negeri. Berdasarkan pembacaan s. 32 bersama-sama Akta Kesalahan Pilihanraya 1954, petisyen pilihan raya harus dibicarakan oleh Hakim Pilihan Raya, yang ditakrifkan di bawah Akta sebagai Hakim Mahkamah Tinggi yang dilantik oleh Hakim Besar untuk membicarakan petisyen pilihan raya.

(1a) Plaintif-plaintif, melalui tindakan guaman, mempersoalkan dan membantah keputusan GE13. Tuntutan plaintif-plaintif, oleh itu, terangkum di bawah skop per. 118 dan dengan itu hanya boleh dibawa melalui petisyen pilihan raya untuk didengar oleh hakim pilihan raya dan bukan melalui guaman sivil untuk dihukum oleh seorang hakim dalam pelaksanaan bidang kuasa sivil lazim masing-masing. Pliding kausa tindakan tidak boleh bertujuan memberikan bidang kuasa kepada Mahkamah Tinggi kerana kesan kausa tindakan dan relif-relif yang dituntut adalah untuk mempersoalkan pilihan raya yang melalui per. 118 terletak hak semata-mata dengan Mahkamah Pilihan Raya. Apa-apa percubaan untuk memberikan bidang kuasa kepada Mahkamah Tinggi dengan memplidkan kausa tindakan sebegitu akan melanggar per. 118.

(2) Hakim Mahkamah Tinggi tidak terkhilaf dalam memutuskan bahawa prinsip *R Rama Chandran* tidak terguna pakai dalam kes ini. Mahkamah Persekutuan melafazkan prinsip itu semasa menangani kes di mana Mahkamah Tinggi melaksanakan bidang kuasa penyeliaan di bawah s. 25 dibaca bersama-sama perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964. Mahkamah Persekutuan memutuskan bahawa Mahkamah Tinggi dalam prosiding *certiorari* tidak hanya berkuasa membatalkan keputusan yang dipersoalkan tetapi boleh membentukkan relif menurut desakan-desakan keadaan untuk memenuhi tuntutan keadilan. Dalam kes ini, tiada persoalan timbul berkenaan mahkamah melaksanakan kuasanya untuk membentukkan relif kerana mahkamah dari awalnya tidak mempunyai bidang kuasa untuk mendengar perkara itu.

(3) Perkara 114(3) Perlembagaan Persekutuan dengan jelasnya menyatakan bahawa Mahkamah Tinggi tidak berbidang kuasa menyingkirkan ahli-ahli Suruhanjaya Pilihan Raya daripada tugasan mereka. Perkara 114(3) memperuntukkan bahawa ahli-ahli

Suruhanjaya Pilihan Raya hanya boleh disingkirkan daripada tugasan mereka atas alasan-alasan dan mengikut cara sebagaimana seorang Hakim Mahkamah Persekutuan. Oleh itu, seperti Hakim Mahkamah Persekutuan, bidang kuasa menyingkirkan ahli-ahli Suruhanjaya Pilihan Raya diperuntukkan kepada Yang Di Pertuan Agong bertindak atas cadangan-cadangan Tribunal yang ditubuhkan bagi tujuan itu. Mahkamah Tinggi, dengan itu, tidak berbidang kuasa memerintahkan penyingkiran defendan-defendan daripada tugasan mereka. Oleh itu, guaman plaintif-plaintif harus dibatalkan kerana ia menyusahkan, remeh dan satu penyalahgunaan proses mahkamah.

Oleh Prasad Sandosham Abraham HMR (menentang):

(1) Perayu-perayu telah memohon relif pengisytiharan dari segi menjalankan kuasa dan kewajipan perlembagaan responden di bawah Perlembagaan Persekutuan yang dibaca bersama-sama Akta Pilihanraya 1958 dan Tatacara. Permohonan (1) boleh berdiri sendiri, memohon perintah pengisytiharan tanpa apa-apa relif berbangkit. Terbuka kepada perayu-perayu membangkitkan melalui deklarasi sama ada responden melanggar kewajipan perlembagaan mereka untuk menjalankan pilihan raya umum adil. Ini adalah isu secara penting yang tidak boleh dilupuskan terus. Memohon hak pengisytiharan tanpa relif berbangkit harus digalakkan kerana undang-undang di bawah s. 41 Akta Relief Spesifik 1950 membenarkannya.

(2) Ini bukan kes yang layak dan sesuai untuk ringkasan pelupusan di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah 2012. Atas sebab-sebab tersebut, perintah Mahkamah Tinggi perlu diubah untuk membenarkan hanya tuntutan perayu dalam terma permohonan (1) penyata tuntutan perayu-perayu untuk dikembalikan; untuk perkara diremitkan ke Mahkamah Tinggi bagi pengurusan kes dan pihak-pihak bebas bagi meminda pliding masing-masing.

Case(s) referred to:

Devan Nair v. Yong Kuan Teik [1967] 1 LNS 37 PC ***(refd)***

Election Commission, Malaysia v. Abdul Fatah Haron [1987] 2 CLJ 193; [1987] CLJ (Rep) 92 SC ***(refd)***

Hugh Saik Meng & Anor v. Daing Ibrahim [1975] 4 MC 275 ***(refd)***

Muhammad Sanusi Md Nor lwn. Mohd Tajuddin Abdullah & Yang Lain [2009] 1 CLJ 1 FC ***(refd)***

Muniandy Subrayan & Ors v. Chairman & Board Members, Koperasi Menara Maju Bhd [1997] 1 CLJ 417 ***(refd)***

NP Ponnuswami v. Returning Officer, Namakkal Constituency AIR 1952 SC 64 ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Re Application By Hamid Hassan; Hamid Hassan v. Returning Officer, Karak & Ors [1979] 1 LNS 87 HC ***(refd)***

A *Tengku Korish v. Mohamed Jusoh & Anor And Abdul Raouf v. Ibrahim Arshad & Anor And Mokhtar Abdullah v. Mokhtar Haji Daud & Anor [1969] 1 LNS 189 HC* ***(refd)***
Theberge v. Laundry (1876-7) 2 App Cas 102
Union of India v. Association for Democratic Reforms [2002] 5 SCC 294 ***(dist)***
Yong Kuan Teik v. Devan Nair [1965] 1 LNS 206 FC ***(refd)***

B **Legislation referred to:**
Courts of Judicature Act 1964, s. 25
Elections Act 1958, s. 5(1)(a)
Election Offences Act 1954, ss. 2, 32, 33(1)
Federal Constitution, arts. 113, 114(3), 118, 125(3)
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)
C Specific Relief Act 1950, s. 41

Constitution of India, arts. 226, 329(b)

Other source(s) referred to:
VS Rama Devi & SK Mendiratta, *Election Law, Practice and Procedure,* 1st, edn, pp 188-189

D *For the appellants - Tommy Thomas (Ambiga Sreenevasan, Americk Sidhu & Michelle Sunita Kummar with him); M/s Tommy Thomas*
For the respondents - Amarjeet Singh Serjit Singh (Suzana Atan with him); SFC

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 22 NCVC-451-07-2013 (affirmed)]

E *[Editor's Note: The majority judgment of this case has been published in [2015] 6 CLJ 277. The dissenting judgment is only forthcoming recently and for ease of reference, the editors have decided to re-publish the judgment in whole.]*

Reported by Suhainah Wahiduddin

F **JUDGMENT**

Alizatul Khair Osman JCA:

[1] This is an appeal by the appellants (the plaintiffs) against the decision of the learned High Court Judge who had struck out the plaintiffs' writ and
G statement of claim pursuant to an application by the respondents (the defendants) under O. 18 r. 19(1)(a) and (b) of the Rules of Court 2012.

Brief Background

[2] The plaintiffs herein brought this action against the Elections
H Commission (the defendants herein who are sued as members of the Elections Commission) alleging conspiracy and fraud in relation to the use of indelible ink in the 13th General Elections (GE13).

[3] It is an undisputed fact that the GE13 which was held on 5 May 2013 saw the ruling party (the Barisan Nasional) returned to power with a majority
I of 133 seats out of a total of 222 seats in Parliament.

[4] The opposition, a loosely formed coalition known as Pakatan Rakyat, comprising of the Parti Islam Se-Malaysia (PAS), the Democratic Action Party (DAP) and the Parti Keadilan Rakyat (PKR) lost approximately 43 seats in the GE13 with allegedly relatively narrow margins of less than ten votes.

[5] The plaintiffs alleged that the failure of the indelible ink which was intended to prevent multiple voting by dishonest voters was caused solely by the defendants' breach of their constitutional duty to properly conduct the GE13. The plaintiffs further alleged that the defendants have practiced fraud on the electorate by the misuse of the indelible ink.

[6] The plaintiffs contended that the failure of the indelible ink rendered the election results null and void.

The Plaintiffs' Action

[7] Pursuant to the above, the plaintiffs filed this action. The plaintiffs in this action comprised the following:

(a) PAS, DAP and PKR (the first, second and third plaintiffs respectively);

(b) the unsuccessful candidates nominated by their respective parties to represent Pakatan Rakyat in the GE13 ie, the fourth, fifth and sixth plaintiffs; and

(c) the registered voters in the GE13 ie, the seventh and eighth plaintiffs.

[8] The reliefs sought by the plaintiffs in this action are, *inter alia* the following:

(a) a declaration that the defendants whether acting individually or collectively as the Elections Commission, failed in their constitutional duty and obligation to properly conduct the GE13;

(b) a declaration that the defendants whether acting individually or collectively as the Elections Commission maliciously and dishonestly practiced fraud on the Malaysian electorate by the misuse of indelible ink for voting in the GE13;

(c) by reason of the aforesaid action and omissions of the defendants, a declaration that the results of the GE13 for all the 222 parliamentary seats be declared null and void;

(d) in consequence of the above, an order setting aside the results for all the 222 parliamentary seats in the GE13;

(e) in consequence of the defendants' aforesaid conduct, an order that each of the defendants be removed from office as members of the Elections Commission;

(f) an order that a newly constituted Elections Commission conduct fresh general elections for all the 222 parliamentary seats; and

(g) exemplary damages.

[9] A perusal of the plaintiffs' claim reveal that the plaintiffs' entire action concerns the manner in which the elections (ie, GE13) were conducted by the Elections Commission, the chief complaint being the use of the indelible ink. In this regard, the plaintiffs' pleaded causes of actions were essentially as follows:

(i) violation of fundamental liberties *vis-à-vis* the fourth to the eighth plaintiffs "by the massive cheating occasioned by the misuse of indelible ink";

(ii) fraud by the use of washable ink which facilitated multiple voting to the detriment of the plaintiffs, (para. 85 of the statement of claim);

(iii) conspiracy by the defendants, the defendants' staff and persons unknown in enabling the use of the indelible ink, (para. 86 of the statement of claim);

(iv) that by the matters aforesaid, the defendants had acted in breach of their constitutional and statutory duties, (para. 85 of the statement of claim); and

(v) that by the matters aforesaid, each of the defendants had committed the tort of misfeasance by a public officer.

The Striking Out Application

[10] The defendants contended that the plaintiffs' action is "frivolous and vexatious" or "an abuse of the process of court" and hence ought to be struck out pursuant to O. 18 r. 19(1)(b) or (d) of the Rules of Court 2012. As stated by the learned judge in her judgment, the defendants' application under the said order was premised on two main grounds:

(a) that according to art. 118 of the Federal Constitution the only method to challenge election results is by way of an Election Petition and not by moving this court under its original civil jurisdiction as it is done here; and

(b) that this court has no power and jurisdiction to make an order removing the defendants from office as art. 114(3) of the Federal Constitution provides that members of the Elections Commission can only be removed on the like grounds and in the like manner as that of a judge of the Federal Court.

Decision Of The High Court

[11] The learned judge found that the court did not have the jurisdiction to grant the reliefs sought by the plaintiffs. Her Ladyship held that the plaintiffs were bound by art. 118 of the Federal Constitution and the Election Offences

Act 1954 in that any challenge to the elections in respect of any of the 222 seats of Parliament must be by way of an election petition to an election judge.

[12] The learned judge also held that by virtue of art. 114(3) of the Federal Constitution the court did not have the necessary jurisdiction to order the removal of the defendants as members of the Elections Commission for their alleged fraud and breach of constitutional duties. The said article stipulates that members of the Elections Commission can only be removed from office "on the like grounds and in the like manner as a judge of a Federal Court", that is by a tribunal appointed by the Yang di-Pertuan Agong.

[13] For the above reasons, the learned judge found the plaintiffs' claim to be obviously sustainable and she accordingly ordered it to be struck out under O. 18 r. 19(1)(b) or (d) of the Rules of Court 2012.

Issues

[14] As pointed out by learned Senior Federal Counsel (SFC) in his written submission the issues raised by the plaintiffs in their memorandum of appeal may be summarised as follows:

(i) whether the High Court has jurisdiction to question an election by way of a writ action where:

  (a) a breach of constitutional duty and fundamental liberties is alleged against the Elections Commission; and

  (b) fraud, deceit, conspiracy and misfeasance by a public officer is alleged. (First issue)

(ii) whether the principle in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 to mould the relief in accordance with the demands of justice applies in this case. (Second issue)

(iii) whether the High Court has jurisdiction to make an order removing the members of the Elections Commission from their office. (Third issue)

The Plaintiffs' Submission

First Issue

[15] The plaintiffs contended that the learned judge erred in concluding that based on art. 118 of the Federal Constitution, (art. 118) the proper and correct method in commencing this action is by way of an election petition presented separately to the election courts where the respective election was held and as such the court did not have the necessary jurisdiction to hear the plaintiffs' suit. In the plaintiffs' view, the learned judge fell into error in construing art. 118 in such broad and general terms so as to oust the High Court's general jurisdiction to hear the matter.

[16] Article 118 merely provides that:

(a) any challenge to an election result in a specific constituency for a parliamentary seat or a state seat in both general elections and by-election must be by way of an election petition to an election court;

(b) following from the above the only remedy available to a petitioner who succeeds in his election petition is for the election court to nullify the election results and order a re-election.

[17] The crux of the plaintiffs' complaint in this civil suit is "the absolute abuse or misuse of indelible ink by the Elections Commission which resulted in multiple voting on a substantial scale, which in this case caused 43 parliamentary seats to be fraudulently counted to the detriment of the plaintiffs."

[18] The plaintiffs' causes of action therefore involve, *inter alia*, breaches by the defendant of their constitutional duties and obligations.

[19] These causes of action can only be brought by way of a writ and not an election petition under art. 118 as they fall outside the scope of the said article.

[20] For the same reason the plaintiffs argued that the remedies they sought in their civil suit, that is, *inter alia*, a declaration that the Elections Commission and its members failed in their constitutional duty to properly conduct the GE13 and a declaration that the Elections Commission and its members maliciously and dishonestly practiced fraud on the electorate, can never be granted by the election court.

The Defendants' Submission

[21] The defendants, on the other hand, contended that the High Court does not have any jurisdiction to try any matter questioning an election to the Legislative Assembly.

[22] Their contention is based primarily on the language of art. 118 which according to the defendant is "couched in imperative and absolute terms."

[23] Article 118 reads as follows:

> No election to the House of Representations or to the Legislative Assembly of a state shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

[24] It is clear from the above provision that an election can only be called into question by an election judge hearing an election petition.

[25] In this regard, the Election Offences Act 1954 is the relevant law governing election petitions and the appointment and powers of an election judge. (see ss. 2, 32 and 33 of the said Act). Other than the said Act there

is no other written law including the Courts of Judicature Act 1964 that confers jurisdiction on the High Court to question an election to the Legislative Assembly.

[26] Thus the mere pleading of the causes of actions such as breach of fundamental liberties and the torts of fraud, deceit, conspiracy and misfeasance by a public officer as was done by the plaintiffs, in this suit cannot confer any jurisdiction on the High Court in the face of the clear words of art. 118.

[27] The exclusive jurisdiction of the election court to hear any challenge to an election is reflected in the judgment of the Supreme Court in the case of the *Election Commission, Malaysia v. Abdul Fatah Haron* [1987] 2 CLJ 193; [1987] CLJ (Rep) 92; [1987] 2 MLJ 716 when it held that:

> Any dissatisfaction with or challenge to an election should be brought up by way of an election petition before an election judge and nowhere else.

[28] The defendants also referred to the case of *NP Ponnuswami v. Returning Officer, Namakkal Constituency* AIR 1952 SC 64 in which the Supreme Court of India dismissed an application for *certiorari* to quash the decision of a returning officer rejecting the applicant's nomination papers. In doing so, the Supreme Court held that art. 329(b) of the Constitution of India (which is equivalent to our art. 118) was intended primarily to oust the jurisdiction of all courts in relation to electoral matters and to provide the only mode in which an election can be challenged.

[29] The other reason advanced by the defendants (in support of their contention) is that the jurisdiction to question an election is unknown to the common law and equity.

[30] Prior to the passing of legislation conferring jurisdiction to independent tribunals, the jurisdiction to question an election lie with the House of Commons. This type of legislation was described by the Privy Council in *Theberge v. Laundry* (1876-7) 2 App Cas 102 and followed by the Federal Court in *Yong Kuan Teik v. Devan Nair* [1965] 1 LNS 206; [1965] 2 MLJ 162, FC it held as follows:

> These two Acts of Parliament … are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating and entirely new, and up to that time unknown, jurisdiction in a particular court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly …

[31] The Privy Council in *Devan Nair v. Yong Kuan Teik* [1967] 1 LNS 37; [1967] 1 MLJ 261, subsequently affirmed this position.

[32] The case of *NP Ponnuswami (supra)* is authority for the above proposition and has been followed by our courts in *Tengku Korish v. Mohamed Jusoh & Anor And Abdul Raouf v. Ibrahim Arshad & Anor And Mokhtar Abdullah v. Mokhtar Haji Daud & Anor* [1969] 1 LNS 189; [1970] 1 MLJ 6 and *Re Application By Hamid Hassan; Hamid Hassan v. Returning Officer, Karak & Ors* [1979] 1 LNS 87; [1979] 2 MLJ 183.

[33] The Federal Court in the fairly recent case of *Muhammad Sanusi Md Nor lwn. Mohd Tajuddin Abdullah & Yang Lain* [2009] 1 CLJ 1 cited with approval the aforesaid cases and reiterated the legal position as articulated by Hashim Yeop Sani (as he then was) in *Hugh Siak Meng & Anor v. Daing Ibrahim* [1975] 4 MLJ 275; [1975] 4 MC 275 which was as follows:

> The right of a person conferred under the law relating to election is a special statutory right conferred by a special statute and this right has its origin in the special statute itself and not under the common law or equity. The legislature has created a special tribunal for the purpose of trying Election Petitions and the jurisdiction is a peculiar jurisdiction.

Our View

First Issue

(i) Whether the High Court has jurisdiction to question an election by way of a writ action where:

(a) a breach of constitutional duty and fundamental liberties is alleged against the Elections Commission; and

(b) fraud, deceit, conspiracy and misfeasance by a public officer is alleged.

[34] On this issue, we are in complete agreement with the learned judge's finding that "… the purpose and the pit *(sic)* and substance of the plaintiff's claim is to seek an order to declare the 13th GE as null and void. The alleged breach of constitutional duty and obligation of the Elections Commission or the defendants and the alleged use of the indelible ink merely provide the basis or the foundation that will be relied upon by the plaintiffs for asking such an order."

[35] The learned judge rightly concluded that "the proper and correct method in challenging the said election is through an election petition …" and as such the court did not have the necessary jurisdiction to hear the plaintiffs' suit.

[36] The main complaint of the plaintiffs in this suit is the "absolute abuse or misuse of indelible ink" during the recent GE13 which according to them, resulted in multiple voting on a massive scale and ultimately caused the plaintiff to lose 43 parliamentary seats in the GE13.

[37] The failure of the indelible ink, the plaintiffs contended, was caused primarily if not solely by the defendants' breach of their duties and obligations under the Constitution which breach vitiated the election results.

[38] Accordingly the plaintiffs' pleaded causes of action against the defendants are for:

(i) breach of constitutional duty on the part of the defendants;

(ii) violation of fundamental liberties under Part II of the Federal Constitution;

(iii) fraud;

(iv) deceit'

(v) conspiracy; and

(vi) the tort of misfeasance by a public officer.

[39] The plaintiffs contended that the learned judge was wrong in allowing the defendants' application to strike out the writ because:

(i) this is clearly not a "plain and obvious" case to struck out as it involves "difficult and novel constitutional issues" which can only be determined after a full trial;

(ii) the plaintiffs' causes of action cannot be the subject matter of an election petition as they involved, *inter alia*, breaches by the defendants of their constitutional duties and obligations;

(iii) the remedies sought in the civil suit can never be granted by an election court because of the nature of the reliefs pleaded in the plaintiffs' statement of claim (see p. 5 of this judgment).

[40] The issue before us is essentially one of jurisdiction, that is whether the High Court has the jurisdiction to quash an election petition by way of a writ action where a breach of constitutional duty and fundamental liberties is alleged against the Elections Commission (ie, the defendants) and fraud, deceit, conspiracy and misfeasance by a public officer is alleged.

[41] In our view, it is unequivocally clear from the language of art. 118 of the Constitution, that in Malaysia an election can only be questioned by an election judge trying an election petition. As submitted by learned Senior Federal Counsel (SFC) art. 118 is "couched in imperative and absolute terms". (see para. 23 of this judgment).

[42] The effect of the aforesaid provision is that the High Court is excluded from exercising any jurisdiction over all matters that call into question an election be it to the House of Representation or to the State Assembly.

[43] Based on s. 32 read together with s. 33(1) of the Election Offences Act 1954 (the law pertaining to election petition) an election petition is to be tried by an election judge which under the said Act is defined as a judge of the High Court nominated by the chief judge to try an election petition.

[44] The Supreme Court in *Election Commission, Malaysia v. Abdul Fatah Haron* [1987] 2 CLJ 193; [1987] CLJ (Rep) 92 SC [1987] 2 MLJ 716 stated in no uncertain terms that:

> Any dissatisfaction with or challenge to an election should be brought by way of an election petition before an election judge and nowhere else.

[45] The plaintiffs sought to argue that their pleaded causes of action *inter-alia*, breaches of the Constitution, fraud, deceit, conspiracy and misfeasance by a public officer cannot be the subject matter of an election petition as the latter is limited in its scope both as to the causes of action and the remedies available.

[46] However, as the plaintiffs themselves admitted in their written submission, the essence of their complaint in the civil suit is the absolute abuse or misuse of indelible ink by the Elections Commission (ie, the defendants) "which resulted in multiple voting on a substantial scale, which in turn caused about 43 parliamentary seats to be fraudulently counted to the detriment of the plaintiffs."

[47] The plaintiffs, *vide* their civil suit is in effect calling into question or rather challenging the results of the GE13. The plaintiffs' claim therefore falls squarely within the scope of art. 118 and as such can only be brought by way of an election petition to be heard by an election judge and not by way of a civil suit to be adjudicated upon by a judge in the exercise of his or her ordinary civil jurisdiction.

[48] We agree with the learned SFC that the mere pleading of the causes of action cannot purport to confer jurisdiction on the High Court as the effect of these causes of action and the reliefs sought is to call into question the elections (ie, GE13) which by virtue of art. 118 is vested solely with the election court. Any attempt to confer jurisdiction on the High Court by pleading such causes of action would amount to a violation of art. 118.

[49] In this regard, we agree with the learned judge that the case of *Union of India v. Association for Democratic Reforms* [2002] 5 SCC 294 cited by the plaintiffs in support of their case can be distinguished. The aforesaid case concerns a voter's right to information about a candidate standing for elections and the parties they represent. It was not a case which questioned the elections or the results of the election.

[50] The Supreme Court rightly held that the High Court had the necessary powers under art. 226 of the Indian Constitution (which is in *pari materia* with para. 1 of the Schedule of the Courts of Judicature Act 1964) to make an order that for voters to make a right choice it is essential that the history

of the candidates be disclosed to the voters and for this purpose the Elections Commission is empowered to issue the directions as ordered by the High Court Judge.

[51] Our position as enshrined in art. 118 is similar to the position in India where art. 329(b) of the Constitution of India provides as follows:

> Notwithstanding anything in their Constitution:
>
> (a) …
>
> (b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election presented to such authority and in such manner as may be provided for by or under any law made by the appropriate authority.

[52] The Indian Supreme Court's observation on the scope and effect of art. 329(b) in *N.P. Ponnuswami v. Returning Officer Namakkal Constituency, Namakkal, Salem Dist. And Four others (supra)* is instructive for our purpose:

> Article 329(b), … was primarily intended to exclude or oust the jurisdiction of all courts in regard to electoral matters and to lay down the only mode in which an election could be challenged.

[53] There the appellant had moved the High Court under art. 226 of the Indian Constitution for a writ of *certiorari* to quash the order of the returning officer rejecting his nomination papers and to direct the returning officer to include his name in the list of valid nominations to be published. The High Court dismissed the appellants' application on the ground that it had no jurisdiction to interfere with the order of the returning officer by reason of the provisions of art. 226 of the Indian Constitution.

[54] The appellant contended that the view expressed by the High Court is not correct, the jurisdiction of the High Court is not affected by art. 329(b) of the Indian Constitution and that he was entitled to a writ of *certiorari* in the circumstances of the case.

[55] The Supreme Court, dismissed the appeal holding that the improper rejection of a nomination paper is a ground on which an election may be called into question and therefore by virtue of art. 329(b) the only mode provided for such a challenge was by way of an election petition.

[56] One of the reliefs sought by the plaintiffs in the present case is a declaration that the results announced by the defendants for all the 222 parliamentary seats should be declared null and void, and hence an order setting aside the results of all the said 222 seats.

[57] The plaintiffs' suit is premised on the alleged misuse of the indelible ink which they claimed resulted in Pakatan Rakyat losing the GE13 by approximately 43 seats with narrow majorities of less than 10% of the vote.

They further contended that the "massive cheating caused by the washing away of the indelible ink destroyed the integrity of the entire voting process of GE13. It vitiates the results of GE13."

(see paras. 76-81, pp. 122-123 of the record of appeal, Bah. A).

[58] Learned counsel for the plaintiffs, Mr T Thomas argued that as the plaintiffs here are seeking to nullify the entire results of GE13 they could not do so by way of an election petition. According to learned counsel, the true effect and scope of art. 118 is that any challenge to an election result in a specific constituency for a parliamentary seat or a state seat must be by way of an election petition to any election court. This includes challenges to an election result in both general elections and by-elections.

[59] Thus, where in this case the plaintiffs are seeking to challenge the entire results of the GE13, art. 118 cannot apply and recourse can only be had by filing an action in the High Court to declare the GE13 null and void.

[60] We are unable to agree with learned counsel's submission. We would only refer to the judgment of the Indian Supreme Court in *Indrajit Barua v. Election Commission of India*, LAWS(SC)-1985-9-42 where the Supreme Court, in dismissing a petition to nullify the elections on the ground that the holding of elections on the basis of the void electoral rolls of 1979 was contrary to law and vitiated the elections, held as follows:

> In the first place, Art. 329(b) of the Constitution bars any challenge to the impugned elections by a writ petition under Art. 226 as also on the ground that the electoral rolls on the basis of which the impugned elections were held were invalid. The petitioners sought to escape from the ban of Art. 329(b) by contending that they are challenging the impugned elections as a whole and not any individual election and that the ban of Art. 329(b), therefore, does not stand in the way of the writ petitions filed by them challenging the impugned elections. But we do not think this escape route is open to the petitioners. There is in the Representation of the People Act, 1951, no concept of elections as a whole. What that Act contemplates is election from each constituency and it is that election which is liable to be challenged by filing an election petition. It may be that there is a common ground which may vitiate the elections from all the constituencies, but even so it is the election from each constituency which has to be challenged though the ground of challenge may be identical. Even where in form the challenge is to the elections as a whole, in effect and substance what is challenged is election from each constituency, and Art. 329(b) must, therefore, be held to be attracted.

[61] We are of the view that the legal position *vis-à-vis* art. 329(b) of the Indian Constitution read together with the Representation of the Peoples Act 1951 as lucidly enunciated by the Supreme Court (above) applies equally here based on the equipollent provisions of art. 118 of our Constitution and the Election Offences Act 1954. What art. 118 and the Election Offences Act 1954 contemplate is election from each constituency and it is that election

which is liable to be challenged by filing an election petition. As observed by the Supreme Court even where in form the challenge is to the elections as a whole, in effect and substance what is challenged is election from each constituency, and, in our case, art. 118 must therefore be held to be attracted.

[62] In fact, this was alluded to by the learned High Court Judge when she held that "the proper and correct method in challenging the said election is through an election petition presented separately to the election court where the respective election was held and not by way of the present action where the plaintiffs are seeking to declare all the 222 seats of Parliament and the entire 13th GE as null and void."

[63] Finally learned counsel sought to argue that, even if the court does not have the jurisdiction to grant the order declaring the GE13 null and void, the court has the jurisdiction to grant the first two declarations sought for by the plaintiffs which in his view are 'self-standing'.

[64] The first two declarations sought by the plaintiffs are as follows:

1. A Declaration that each of the Defendants, whether acting individually or collectively as the EC, jointly or severally, failed in their constitutional duty and obligation to properly conduct the 13th General Elections; and

2. A Declaration that each of the Defendants, whether acting individually or collectively as the EC, maliciously and dishonestly practiced a fraud on the electorate of Malaysia by the misuse of indelible ink for voting in GE13.

[65] We find, with respect, learned counsel's argument untenable. We agree with learned SFC that prayers (1) and (2) cannot stand independently. The ultimate effect of these orders would be to render the GE13 null and void and as such would attract the provisions of art. 118 of the Constitution.

[66] In the light of our finding above, we do not think it necessary to express our view on the defendants' submission that as the jurisdiction to question an election is not known to the common law and equity the plaintiffs cannot avail themselves to any of the common law tortious cases of action.

Second Issue

(ii) Whether the principle in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 to mould the relief in accordance with the demands of justice applies in this case.

[67] It is the plaintiffs' contention that the learned judge erred in holding that the principle in *R Rama Chandran (supra)* does not apply in the present case.

[68] In our view, the learned judge did not err in holding as such. As submitted by learned SFC, the Federal Court when enunciating the principle was dealing with a case where the High Court was exercising its supervisory jurisdiction under s. 25 read together with para. 1 of the Schedule to the Courts of Judicature Act 1964. The Federal Court held that the High Court in *certiorari* proceedings not only had the power to quash the impugned decision but could mould the relief in accordance with the exigencies of the situation in order to satisfy the demands of justice.

[69] In the instant case, there is no question of the court exercising its power to mould the relief as the court does not in the first place, have the jurisdiction to hear the matter.

Third Issue

(iii) Whether the High Court has jurisdiction to make an order removing the members of the Elections Commission (ie, the defendants) from their office.

[70] On this issue too we have no reason to disagree with the learned judge's finding. It is clear from art. 114(3) of the Federal Constitution that the High Court does not have the jurisdiction to remove members of the Elections Commission from their office.

[71] Article 114(3) provides that members of the Elections Commission can only be removed from office on the like grounds and manner as that of a judge of a Federal Court. Article 114(3) reads thus:

> A member of the Election Commission shall cease to hold office on attaining the age of sixty-six years or on becoming disqualified under Clause (4) and may at any time resign his office by writing under his hand addressed to the Yang di-Pertuan Agong, but shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court.

[72] The manner in which a judge of the Federal Court can be removed from office is provided for under art. 125(3) of the Federal Constitution which states as follows:

> If the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that a judge of the Federal Court ought to be removed on the ground of any breach of any provision of the code of ethics prescribed under Clause (3b) or on the ground of inability, from infirmity of body or mind or any other cause, the Yang di-Pertuan Agong shall appoint a tribunal in accordance with Clause (4) and refer the representation to it; and may on the recommendation of the tribunal remove the judge from office.

[73] Thus, as with a judge of the Federal Court the jurisdiction to remove members of the Elections Commission is vested with the Yang di-Pertuan Agong acting on the recommendation of the tribunal set up for that purpose. The High Court therefore does not have any jurisdiction to make an order for the removal of the defendants from their office.

[74] In any event, it is our view that this issue is contingent upon whether the court finds it has the jurisdiction to hear the matter. As found by the learned judge the alleged breach of constitutional duty by the defendants and other alleged wrongdoing as pleaded merely provide the foundation upon which the plaintiffs are challenging the validity of the GE13.

[75] As such art. 118 would apply and the (High) Court is bereft of any jurisdiction to hear the matter. That being the case the issue of whether the court has the jurisdiction to remove members of the Elections Commission from office does not really arise.

Conclusion

[76] For the above reasons we find the learned judge was correct in holding that the court did not have the jurisdiction to hear the plaintiffs' suit and it ought therefore to be struck out for being vexatious, frivolous and an abuse of the process of court.

[77] We accordingly, by a majority, dismiss the appeal and affirm the learned judge's decision. We make no order as to costs. The deposit is refunded.

Prasad Sandosham Abraham JCA:

[78] This appeal arose out of a decision of the learned judge in Kuala Lumpur High Court, striking out the appellants' claim in its entirety with costs. The appellants appealed to this court, and by a majority judgment delivered on 17 September 2014 the appeal was dismissed. I dissented and allowed the appeal.

[79] Before I deal with Her Ladyship's judgment in the Kuala Lumpur High Court, let me first refer to the relief sought in the plaintiffs' statement of claim found in (p. 127 of the appeal record bahagian A vol. 1/8). The first two reliefs sought are declaratory reliefs and the rest are consequential relief. The thrust of the relief sought was to set aside the 2014 General Elections and nullify the same and for the seeking of the removal of Election Commission Members, amongst the other relief sought. In the application to strike out the appellants' pleading, the respondents argue that the relief sought was to avoid the General Election results in 2014 and for removal of the members of the Election Commission. It was argued that the election results could only be set aside through an election petition and the dismissal of Election Commission Members was clearly provided for in the Federal Constitution. It follows that since the relief sought is unsustainable, the suit should be struck out.

[80] This argument appears to have found favour with the learned judge in her grounds of judgment (see p. 33 to p. 38 of the appeal record), the learned judge predicated her reasoning on art. 118 of the Federal Constitution and accordingly struck out the appellants' statement of claim and dismissed the appellants' claim.

[81] Before this court, the same arguments were presented. Bearing in mind that this was an application to strike out the appellants' claim and the duty of the court was to save the pleadings by amendment rather than striking out, (see *Muniandy Subrayan & Ors v. Chairman & Board Members, Koperasi Menara Maju Bhd* [1997] 1 CLJ 417*;* [1997] 1 MLJ 557 CA), I considered the relief prayed for in prayer (1) of the statement of claim. Here the appellants were seeking purely declaratory relief in terms of the exercise of the constitutional powers and duties of the respondents under the Federal Constitution read together with the Elections Act 1958 and Regulations. In my judgment prayer (1) can stand on its own, seeking a declaratory order without any consequential relief. It would follow that all the appellants would obtain is a declaration on whether the respondents were in breach of their constitutional duties in the conduct of elections. It is a sustainable argument to advance, that whilst it is open to mount a claim against the respondents on this basis, but where the election process is challenged and where an election result is to be avoided, then only you must proceed through an election petition. I refer also to *Election Law, Practice and Procedure First Edition* VS Rama Devi & SK Mendiratta at pp. 188-189 and I quote:

> The responsibility of superintendence, direction and control of the conduct of elections may cover powers, duties and functions of many sorts, administrative or other depending upon the circumstances Article 324, on the face of it, vests vast functions in the commission which may be powers or duties, essentially administrative and marginally on its plenary character in the exercise of its powers. Firstly, when Parliament or any state legislature has made valid law relating to or in connection with elections, the commission shall act in conformity with, not in violation of, such law. But where such law is silent, art. 324 is a reservoir of power for the commission to act for the avowed purpose of pushing forward, but not divorced from, a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act *bona fide* and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fairplay in action in the mist important area of the constitutional order, namely, elections.
>
> The Supreme Court also observed in that case that arts. 327 and 328 which empower Parliament to make laws with regard to electoral matters are subject to the provisions of the Constitution which include art. 324. The Court observed that:
>
> The framers of the Constitution took care to leaving scope for exercise of residuary power by the Election Commission in its own right, as a creature of the Constitution, in the infinite variety of situations that may

emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen or anticipated with precision. That is why there is no hedging in Art. 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules. The seems to be the raison deter for the opening clause in Arts. 327 and 328 which leaves the exercise of powers under Art. 324 operative and effective when it is reasonably called for in a vacuous area. Where the existing laws are absent and yet a situation has to be tackled, the Chief Election Commissioner has not to fold his hand and pray to God for divine inspiration to enable him to exercise his functions and to perform his duties or to look to any external authority for the grant of power independently, in all matters relating to the conduct of elections, and see that the election process is completed properly in a free and fair manner.

[82] The Federal Constitution, being the Supreme Law of the Federation imposes a constitutional duty on the respondents to conduct elections in accordance with art. 113 of the same. Read together with the Elections Act 1958 & Regulations (Act 19), an act that was promulgated for conduct of elections to the Dewan Rakyat and to the legislative assemblies of the respective States (the said Act). Under s. 5(1)(a) of the said Act under the heading general powers and duties of the Election Commission it is provided and I quote:

(i) The Election Commission shall-

(a) Exercise control and supervision over the conduct of elections and the registration of electors on the electoral rolls, and shall enforce on the part of all election officers fairness, impartiality and compliance with Part VIII of the Constitution and this Act and any regulations made thereunder;

[83] It is open for the appellants to raise by way of a declaration whether the respondents had breached their constitutional duty to conduct the General Elections of 2014 with fairness. At any rate this is an important issue that should not be summarily disposed of.

[84] The other point raised by the respondents is despite prayer (1) of the statement of claim being couched in declaratory terms, its thrust was to avoid the election results despite an absence of consequential relief. In my judgment, seeking a declaration of rights without consequential relief should be encouraged since the law under s. 41 of the Specific Relief Act 1950 allows the same and I quote:

41. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the Plaintiff need not in that suit ask for any further relief:

A Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[85] Reference is also made to the decision of the Federal Court in case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn*
B *Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 and to the judgment of Raja Azlan Shah by Ag CJ (as His Royal Highness then was) at pp. 148 - 149 and I quote:

> In the first place it must be made clear that the existence of a statutory remedy is no bar to an action for a declaration. This case falls within the general principle that the jurisdiction of the High Court is not to be taken
C away without express words; and this applies to an action for a declaration: see *Pyx Granite (ante)*. Secondly, all that a declaration does is to declare the rights of the parties, and the effect of making a declaration would be that it would give the Land Executive Committee an opportunity of having second thoughts at the problem.

D **[86]** In the light of the aforesaid it is my finding that this is not a fit and proper case for summary disposal by way of O. 18 r. 19 of the Rules of Court 2012.

[87] For the aforesaid reasons I allowed the appeal in part:

E (i) the order of the High Court is varied to allow the appellants' claim in terms of prayer (1) only of the statement of claim of the appellants to be reinstated;

(ii) the matter is remitted back to the High Court for case management;

(iii) parties be at liberty to amend their respective pleadings; and

F (iv) costs of the application be costs in the cause.

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